Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 79–10)

Customs Delegation Order No. 55

Order of the Commissioner of Customs, delegating certain functions, rights, privileges, powers, and duties to specified Customs officers under section 509, Tariff Act of 1930, as amended

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Delegation of authority.

SUMMARY: This document delegates to certain specified Customs officers the authority to summon importers, require the production of records, and examine importers and records relating to importations. Specifically, the designated Customs officers would be given the authority to

(a) Summon, upon reasonable notice,
  (1) Any person involved in the importation of merchandise,
  (2) Any person who has possession, custody, or care of relevant records, or
  (3) Any other person deemed proper,
(b) Require the production of records,
(c) Examine records, and
(d) Take testimony under oath

in order to determine the correctness of an entry, the liability of any person for duties and taxes, or the amount of fines and penalties, or to insure compliance with applicable laws and regulations administered by the Customs Service.

This delegation order is necessary to efficiently and effectively administer Customs authority to summon importers and examine records relating to importations.

EFFECTIVE DATE: Jan. 9, 1979.

FOR FURTHER INFORMATION CONTACT: John E. Elkins, Regulations and Legal Publications Division, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; (202–566–8237).

SUPPLEMENTARY INFORMATION: The Customs Procedural Reform and Simplification Act of 1978, Public Law 95–410, 92 Stat. 888, amended section 509, Tariff Act of 1930, as amended (19 U.S.C. 1509), to permit appropriate Customs officers to summon importers, require the production of records, and examine importers and records relating to importations. Specifically, authority is given to

(a) Summon, upon reasonable notice,
  (1) Any person involved in the importation of merchandise,
  (2) Any person who has possession, custody, or care of relevant records, or
  (3) Any other person deemed proper,
(b) Require the production of records,
(c) Examine records, and
(d) Take testimony under oath

in order to determine the correctness of an entry, the liability of any person for duties and taxes, or the amount of fines and penalties, or to insure compliance with applicable laws and regulations administered by the Customs Service.

To efficiently and effectively administer the provisions of 19 U.S.C. 1509, this delegation order gives the authority to summon importers and examine records to the Assistant Commissioner (Investigations); regional directors of investigations; assistant regional directors of investigations; Customs attaches; senior Customs representatives; special agents in charge; regional commissioners; assistant regional commissioners of operations; district directors; area directors; Assistant Commissioner (Internal Affairs); headquarters directors, Internal Security Division, Office of Internal Affairs, and regional directors of internal affairs.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this rule relates solely to agency organization, procedure, or practice, notice and public procedure thereon are unnecessary and good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553.

Conforming amendments to sections of part 162, Customs Regulations, that are affected by this delegation order will be published in the Federal Register as part of the final rule implementing the requirements of 19 U.S.C. 1509 and various other provisions of the Tariff Act of 1930, as amended by the Customs Procedural Reform and Simplification Act of 1978.

AUTHORITY

This delegation is made under the authority given to the Commissioner of Customs by Treasury Department order No. 165, revised (T.D. 53654, 19 F.R. 7241), as amended.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations and Legal Publications Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

CUSTOMS DELEGATION ORDER NUMBER

By virtue of the authority granted to me by Treasury Department order No. 165, revised (T.D. 53654, 19 F.R. 7241), as amended, I delegate to the following specified officers of the Customs Service the functions, rights, privileges, powers, and duties under section 509, Tariff Act of 1930, as amended (19 U.S.C. 1509), to

(a) Summon, upon reasonable notice,
  (1) Any person involved in the importation of merchandise,
  (2) Any person who has possession, custody, or care of relevant records, or
  (3) Any other person deemed proper,
(b) Require the production of records,
(c) Examine records, and
(d) Take testimony under oath

in order to determine the correctness of an entry, the liability of any person for duties and taxes, or the amount of fines and penalties or to insure compliance with applicable laws and regulations administered by the Customs Service:

Assistant Commissioner (Investigations)
Regional directors of investigations
Assistant regional directors of investigations
Customs attaches
Senior Customs representatives
Special agents in charge
Regional commissioners
Assistant regional commissioners of operations
District directors
Area directors
Assistant Commissioner (Internal Affairs)
Headquarters directors, Internal Security Division, Office of Internal Affairs

Regional directors of internal affairs

This order supersedes Customs delegation order No. 49, dated May 9, 1975 (T.D. 75–111, 40 F.R. 22007).

Dated: January 4, 1979.

R. E. CHASEN,
Commissioner of Customs.

[Published in the Federal Register, Jan. 10, 1979 (44 F.R. 2217)]

(T.D. 79–11)

Notice of Recordation of Trade Name

Fort Inc.

On November 24, 1978, there was published in the Federal Register (43 F.R. 55029) a notice of application for the recordation under section 42 of the act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name Fort Inc. The notice advised that prior to final action on the application, filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), consideration would be given to relevant data, views, or arguments submitted in opposition to the recordation and received not later than 30 days from the date of publication of the notice. No responses were received in opposition to the application.

The name "Fort Inc." is hereby recorded as the trade name of Fort Inc., a corporation organized under the laws of the State of Rhode Island, located at 54 Taylor Drive (P.O. Box 4830), East Providence, R.I. 02916, when applied to jewelry, jewelery items, souvenirs, and novelties, manufactured in the United States. No foreign person, partnership, association, or corporation is authorized to use the trade name.

Dated: January 4, 1979.

DONALD W. LEWIS,
Acting Assistant Commissioner,
Regulations and Rulings.

[Published in the Federal Register Jan. 10, 1979 (44 F.R. 2217)]

(T.D. 79–12)

Cotton Textile Products—Restriction on Entry

Restriction on entry of cotton textile products manufactured or produced in India

There is published below a directive of November 17, 1978, received by the Commissioner of Customs from the chairman, Com-

mittee for the Implementation of Textile Agreements, concerning restriction on entry of cotton textile products in certain categories manufactured or produced in India. This directive amends, but does not cancel that committee's directive of May 31, 1978 (T.D. 78–263).

This directive was published in the Federal Register on November 21, 1978 (43 F.R. 54285), by the committee.

(QUO–2–1)

January 5, 1979.

BEN L. IRVIN,
Acting Director,
Duty Assessment Division.

U.S. DEPARTMENT OF COMMERCE,
THE ASSISTANT SECRETARY FOR INDUSTRY AND TRADE,
Washington, D.C., 20230, November 17, 1978.

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,
Department of the Treasury,
Washington, D.C., 20229

DEAR MR. COMMISSIONER: This directive amends, but does not cancel, the directive issued to you on May 31, 1978, by the chairman, Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton textile products, produced or manufactured in India.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton, Wool, and and Man-Made Fiber Textile Agreement of December 30, 1977, as amended, between the Governments of the United States and India; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to amend, effective on November 22, 1978, the 12-month levels of restraint established in the directive of May 31, 1978, for categories 336, 338/393/340, 341, and 347/348 to the following:

Category	*Amended 12-month level of restraint* [1]
336	190,054 dozen
338/339/340	896,006 dozen
341	2,193,208 dozen
347/348	118,886 dozen

[1] The levels of restraint have not been adjusted to reflect any imports after Dec. 31, 1977.

The action taken with respect to the Government of India and with respect to imports of cotton textile products from India have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

ROBERT E. SHEPHERD,
Chairman, Committee for the Implementation of Textile Agreements, and Deputy Assistant Secretary for Domestic Business Development.

(T.D. 79-13)

Countervailing Duties—Bicycle Tires and Tubes From the Republic of Korea

Notice of countervailing duties to be imposed under section 303, Tariff Act of 1930, as amended, by reason of the payment or bestowal of a bounty or grant upon the manufacture, production, or exportation of bicycle tires and tubes from the Republic of Korea

TITLE 19—CUSTOMS DUTIES

CHAPTER 1—U.S. CUSTOMS SERVICE

PART 159—LIQUIDATION OF DUTIES

AGENCY: U.S. Customs Service, Treasury Department.

ACTION: Final countervailing duty determination.

SUMMARY: This notice is to inform the public that a countervailing duty investigation has resulted in a determination that the Government of the Republic of Korea has given benefits with respect to one manufacturer which constitute bounties or grants under the countervailing duty law on the manufacture, production, or exportation of bicycle tires and tubes from the Republic of Korea. Consequently, additional duties in the amount of these benefits will be collected along with regular Customs duties on shipments.

EFFECTIVE DATE: 12, 1979.

FOR FURTHER INFORMATION CONTACT: Holly Kuga, Operations Officer, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202–566–4592.

SUPPLEMENTARY INFORMATION: On July 28, 1978, a "Preliminary Countervailing Duty Determination" was published in the Federal Register (43 F.R. 32910). The notice stated that it had been determined preliminarily that benefits had been bestowed by the Government of Korea on the manufacture, production, or exportation of bicycle tires and tubes which constituted bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303) (referred to in this notice as the "act").

For purpose of this notice, the term "bicycle tires and tubes" means pneumatic bicycle tires and tubes, of rubber or plastic, whether such tires and tubes are sold together as units or separately. Bicycle tires and tubes are covered under items 772.48 and 772.57, respectively, of the Tariff Schedules of the United States (TSUS).

The above-noted preliminary determination indicated that there are three programs utilized by Korean firms exporting bicycle tires and tubes to the United States which confer benefits constituting bounties or grants within the meaning of the act. The countervailable programs are: (1) The Foreign Capital Inducement Law (FCIL); (2) the accelerated depreciation provision of article 51 of the enforcement decree to the Corporation Tax Law; and (3) short-term preferential financing. Only one firm, however, Korea Inoue Kasei, Co., Ltd. (Inoue), was noted as receiving benefits whose aggregate ad valorem effect was greater than de minimis.

The notice stated further that before a final determination would be made in the proceeding, consideration would be given to any relevant data, views, or arguments submitted in writing and received by the Commissioner of Customs not later than August 28, 1978.

After consideration of all information received subsequent to the preliminary determination, it is hereby determined that Korea Inoue Kasei (Inoue) receives bounties or grants within the meaning of section 303 of the act in an amount considered to be more than de minimis. The net amount of the bounty or grant has been ascertained and determined to be 0.5 percent of the f.o.b. price for export to the United States of bicycle tires and tubes from the Republic of Korea produced by Inoue. The other Korean manufacturers/exporters investigated received aggregate ad valorem benefits of no greater than 0.34 percent, which are considered de minimis.

283-800—79——2

The preliminary notice indicated that certain practices by the Korean Government, alleged to be countervailable, were determined on their face not to constitute bounties or grants.

They are as follows:

1. Exemption for export-oriented businesses from business tax.
2. Exemption from commodity tax and customs duties on imported material.
3. Wastage allowance for imported raw materials.

The notice also determined that several other programs, alleged to be bounties or grants, were either not utilized by or not available to manufacturers or exporters of bicycle tires and tubes. They are as follows:

1. Accelerated depreciation for firms located in "Industrial Development Districts."
2. Miscellaneous tax benefits.
3. Industrial estates.
4. Free export zones.
5. Government assumption of quality control on exports.
6. Railway freight and electric power discounts.
7. Export-import "Link System."
8. Medium- and long-term preferential financing.

Since no additional information has been received with respect to any of the programs enumerated above which dictates a change in the conclusions about them reached in the preliminary determination, those conclusions remain unchanged and it is determined that no bounty or grant is being paid with respect to these programs.

Counsel for Inoue contended that the benefits received by Inoue under the FCIL, which provides benefits to companies that are wholly or partially foreign owned, should be treated by Treasury as offsets for "dislocation costs." The "dislocation costs" claimed allegedly result from the difficulty in converting and repatriating Korean currency and from the problem faced in investing in a war-threat ned country. Information was submitted showing that these costs, such as extra expenses incurred in locating and maintaining management personnel in Korea, insurance costs for capital investment, and losses from converting and repatriating Korean currency more than offset the benefits received by Inoue under the FCIL. However, Treasury has never applied the concept of "disclocation costs" to any situation other than that of cost differences between regions within a coun ry. The claim made in this case is with respect to a program that is not limited to a particular region within the Republic of Korea. Because of the fact that this program is national in scope, the claim made for

offsets arising from dislocation costs cannot be accepted. To recognize them in such circumstances would be contrary to one of the principal purposes of the countervailing duty law, namely, to discourage governments from subsidizing the production of goods in situations that lack comparative advantage in the absence of such subsidies.

Accordingly, notice is hereby given that bicycle tires and tubes produced by Inoue which are imported directly or indirectly from Korea, if entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the Federal Register (date), will be subject to the payment of countervailing duties equal to the net amount of the bounty or grant determined to have been paid or bestowed.

In accordance with section 303 of the act, until further notice the net amount of such bounties or grants has been determined to be five-tenths of 1 percent (0.5 pct) of the export price.

Effective on or after the date of publication of this notice in the Federal Register and until further notice, upon the entry for consumption or withdrawal from warehouse for consumption of such dutiable bicycle tires and tubes produced by Inoue imported directly or indirectly from the Republic of Korea, which benefit from these bounties or grants, there shall be collected, in addition to any other duties estimated or determined to be due, countervailing duties in the amount determined in accordance with the above declaration. To the extent that it can be established to the satisfaction of the Commissioner of Customs that imports of bicycle tires and tubes from the Republic of Korea produced by Inoue are subject to a bounty or grant smaller than the amount which otherwise would be applicable under the above declaration, the smaller amount so established shall be assessed and collected.

Any merchandise subject to the terms of this order shall be deemed to have benefited from a bounty or grant if such bounty or grant has been or will be credited or bestowed, directly or indirectly, upon the manufacture, production, or exportation of bicycle tires and tubes, produced by Inoue, from the Republic of Korea.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47(f)) is amended by inserting after the last entry for the Republic of Korea the words "bicycle tires and tubes produced by Korea Inoue Kasei, Co., Ltd.," in the column headed "Commodity," the number of this Treasury Decision in the column headed "Treasury decision," and the words "Bounty Declared-Rate" in the column "Action."

(R.S. 251, as amended, secs. 303, 624; 46 Stat. 687, as amended, 759, 88 Stat. 2051, 2052; (19 U.S.C. 66, 1303), as amended, 1624).

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department order 190 (revision 15) March 16, 1978, the provisions of Treasury Department order 165, revised November 2, 1954, and section 159.47(d) of the Customs Regulations (19 CFR 159.47(d)), insofar as they pertain to the issuance of a countervailing duty order by the Commissione of Customs, are hereby waived.

January 8, 1979.

ROBERT H. MUNDHEIM,
General Counsel of the Treasury.

[Published in the Federal Register Jan. 12, 1979 (44 F.R. 2570)]

(TD–79–14)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar, Thailand baht (tical)

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

People's Republic of China yuan:	
December 11, 1978	$0.611247
December 12–15, 1978	.613685
December 18–22, 1978	.626174
December 25, 1978	Holiday
December 26–27, 1978	.626174
December 28–29, 1978	.630597
Hong Kong dollar:	
December 11, 1978	$0.2082
December 12, 1978	.2083
December 13, 1978	.2086
December 14, 1978	.2085
December 15, 1978	.2087
December 18, 1978	.2088
December 19, 1978	.2086
December 20, 1978	.2084

December 21, 1978	.2081
December 22, 1978	.2080
December 25, 1978	Holiday
December 26, 1978	.2080
December 27, 1978	.2086
December 28, 1978	.2083
December 29, 1978	.208350
Iran rial:	
December 11, 1978	$0.013150
December 12–13, 1978	NA
December 14–15, 1978	.013150
December 18, 1978	.013150
December 19, 1978	NA
December 20, 1978	.013250
December 21–22, 1978	NA
December 25, 1978	Holiday
December 26–29, 1978	NA
Philippines peso:	
December 11–15, 1978	$0.1360
December 18–22, 1978	.1365
December 25, 1978	Holiday
December 26–29, 1978	.1360
Singapore dollar:	
December 11, 1978	$0.4587
December 12–13, 1978	.4600
December 14, 1978	.4589
December 15, 1978	.4620
December 18, 1978	.4640
December 19, 1978	.4638
December 20, 1978	.4633
December 21, 1978	.4611
December 22, 1978	.4598
December 25, 1978	Holiday
December 26, 1978	.4598
December 27, 1978	.4617
December 28, 1978	.4625
December 29, 1978	.4621
Thailand baht (tical):	
December 11–15, 1978	$0.0505
December 18–22, 1978	.0490

Thailand baht (tical)—Continued

December 25, 1978	Holiday
December 26–29, 1978	.0490

(LIQ-3-O:D:E)

Date: January 9, 1979.

BEN L. IRVIN,
Acting Director,
Duty Assessment Division.

(TD-79-15)

Foreign Currencies—Variances From Quarterly Rate

Rates of exchange based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 78-382 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Austria schilling:	
December 28, 1978	$0.075019
Belgium franc:	
December 27, 1978	$0.034783
December 18, 1978	.034590
December 29, 1978	.034710
Denmark krone:	
December 27, 1978	$0.196657
December 28, 1978	(*)
December 29, 1978	.197044
Germany deutsche mark:	
December 27, 1978	$0.549149
December 28, 1978	.546747
December 29, 1978	.549451

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*Rate did not vary this date. Use quarterly rate.

Netherlands guilder:	
December 19, 1978	$0.500751
December 20, 1978	.502386
December 27, 1978	.507872
December 28, 1978	.505561
December 29, 1978	.507099
Sri Lanka rupee:	
December 18–21, 1978	$0.0670

(LIQ-3-O:D:E)

Date: January 9, 1979.

BEN L. IRVIN,
Acting Director,
Duty Assessment Division.

(T.D. 79–16)

Foreign Currencies—Quarterly List of Rates of Exchange

List of buying rates in United States dollars based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

The below appended table lists rates of exchange, in U.S. dollars for certain foreign currencies, based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under the provisions of section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

List of foreign currency values based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under provisions of section 522(c), Tariff Act of 1930, as amended.

Quarter Beginning January 2, 1979, to March 31, 1979

Country	Name of currency	U.S. dollars
Australia	Dollar	$1.1518
Austria	Schilling	.075472
Belgium	Franc	.034783
Canada	Dollar	.8416
Denmark	Krone	.197785
Finland	Markka	.256213
France	Franc	.239808
Germany	Deutsche Mark	.548697
India	Rupee	.1238
Ireland	Pound	2.0300
Italy	Lira	.001212
Japan	Yen	.005139
Malaysia	Dollar	.4539
Mexico	Peso	.044033
Netherlands	Guilder	.508647
New Zealand	Dollar	1.0560
Norway	Krone	.200702
Portugal	Escudo	.021834
Republic of South Africa	Rand	1.1500
Spain	Peseta	.014341
Sri-Lanka	Rupee	.0639
Sweden	Krona	.233781
Switzerland	Franc	.616143
United Kingdom	Pound	2.0300

(LIQ-3-O:D:E)

Date: January 9, 1979.

BEN L. IRVIN,
Acting Director,
Duty Assessment Division.

General Notice

(055507)

American Manufacturer's Petition

Notice of decision on American manufacturer's petition to revoke duty-free treatment under the generalized system of preferences for microscope slides and microcover glasses; notice of petitioner's desire to contest this decision

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of (1) decision on American manufacturer's petition, and (2) receipt of notice of petitioner's desire to contest the decision.

SUMMARY: In response to an American manufacturer's petition to revoke duty-free treatment of microscope slides and microcover glasses under the generalized system of preferences, the Customs Service advised the petitioner that such treatment had been authorized by Executive order and was in conformity with applicable law. Upon being informed that its petition had been denied, the petitioner has filed notice of its desire to contest the Customs Service's decision.

FOR FURTHER INFORMATION CONTACT: William E. Brooks, Special Projects and Programs Branch, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 566–5786.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 13, 1978, a petition was filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of Erie Scientific Co. (a division of Sybron Corp.), an American manufacturer of microscope slides and microcover glasses. The petition requested that the duty-free treatment accorded under the generalized system of preferences (GSP) to microscope slides and microcover glasses be withdrawn. Notice of receipt of this petition was published in the Federal Register on March 10, 1978 (43 F.R. 9911).

The petitioner contended that microscope slides and microcover glasses were "import sensitive" items, and not properly designated as articles eligible to receive duty-free treatment under the GSP. Title V of the Trade Act of 1974 (19 U.S.C. 2461–2465) authorizes the

283-800—79——3

President to establish a generalized system of preferences which would permit the duty-free entry of eligible merchandise imported directly into the United States from countries determined to be "beneficiary developing countries." However, section 503(c)(1) of the Trade Act (19 U.S.C. 2463(c)(1)) provides that the President may not designate any article for duty-free GSP treatment if it is among certain enumerated import-sensitive categories, including "import-sensitive semi-manufactured and manufactured glass products" (sec. 503(c)(1)(F)).

DECISION ON PETITION AND RECEIPT OF PETITIONER'S NOTICE OF DESIRE TO CONTEST

By letter dated July 7, 1978, the petitioner was advised that, by Executive Order No. 11888, dated November 24, 1975 (40 F.R. 55276), the President granted GSP status to laboratory glassware, including glass microscope slides and microcover glasses, not containing over 95 percent silica by weight, provided for in item 547.55, Tariff Schedules of the United States. The petitioner was informed that, since the slides in question were designated as eligible for duty-free treatment under the GSP, the Customs Service will continue to accord them duty-free treatment upon their entry into the United States and compliance with GSP requirements. The Customs Service believes that this treatment is in conformity with the current law and the Executive orders issued thereunder.

In response to this decision, the petitioner filed its notice of desire to contest, in accordance with section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and section 175.23 of the Customs Regulations (19 CFR 175.23). However, under section 516(e) of the Tariff Act of 1930, as amended (19 U.S.C. 1516(e)), current Customs practice will continue so long as no decision of the U.S. Customs Court or the U.S. Court of Customs and Patent Appeals not in harmony with this practice is published.

AUTHORITY

This notice is being published in accordance with section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and sec. 175.24 of the Customs Regulations (19 CFR 175.24).

Dated: January 4, 1979.

ROBERT E. CHASEN,
Commissioner of Customs.

[Published in the Federal Register, Jan. 10, 1979 (44 F.R. 2216)]

(520974)

American Manufacturer's Petition

Notice of receipt of an American manufacturer's petition to reclassify sheets of acrylic resin

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of American manufacturer's petition.

SUMMARY: The Customs Service has received a petition from an American manufacturer of sheets of acrylic resin requesting that imports of these articles be reclassified under item 771.45, Tariff Schedules of the United States (TSUS), regardless of dimension or thickness. The current Customs practice is to classify certain sheets of acrylic resin measuring over 15 inches in width and 18 inches in length under item 771.42, TSUS. Articles classified under item 771.42, TSUS, are dutiable at the rate of 6 percent ad valorem and are eligible for duty-free treatment under the generalized system of preferences (GSP). Articles classified under item 771.45, TSUS, are dutiable at the rate of 8.5 cents per pound and are eligible for duty-free treatment under the GSP unless imported from the Republic of China.

DATES: Interested persons may comment on this petition, and comments must be received on or before (30 days from the date of publication in the Federal Register).

ADDRESS: Comments, preferably in triplicate, should be addressed to the Commissioner of Customs, attention: Regulations and Legal Publications Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202–566–8181.

SUPPLEMENTARY INFORMATION:

BACKGROUND

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), by Rohm and Haas Co., an American manufacturer of sheets of acrylic resin. The petitioner requests that imports of these sheets, regardless of dimension or thickness, be classified under the provision for sheets, wholly or almost wholly of plastics, not of cellulosic plastics materials, of acrylic resin, in item 771.45, Tariff Schedules of the United States (TSUS), which carries

a duty of 8.5 cents per pound. The current Customs practice is to classify sheets of acrylic resin measuring over 15 inches in width and 18 inches in length under the provision for other sheets, wholly or almost wholly of rubber or plastics, not of cellulosic plastics materials, flexible, in item 771.42, TSUS, which carries a duty of 6 percent ad valorem, provided the sheets can be easily bent, turned, or twisted by hand without being broken, cracked, or permanently distorted upon returning by themselves to their original shape. Articles imported from beneficiary-developing countries are eligible for duty-free treatment under the generalized system of preferences (GSP) if classified under either item 771.42, TSUS, or 771.45, TSUS, except that articles from the Republic of China classified under item 771.45, TSUS, are not eligible for GSP treatment. The petitioner believes that classification of acrylic resin sheets under item 771.42, TSUS, is erroneous for a number of reasons.

First, the petitioner contends that the provision for acrylic resin materials in item 771.45, TSUS, is an eo nomine provision which includes all forms of acrylic resin products unless there is a clear manifestation of a contrary congressional intent. The petitioner states that there is no evidence of such a contrary intent, and further notes that item 771.42, TSUS (relating to flexible sheets), is not a heading superior to item 771.45, TSUS; rather, it is a coequal heading and does not qualify, modify, restrict, or invade item 771.45, TSUS. Even if item 771.42, TSUS were a superior heading, the petitioner claims that no article covered by item 771.45, TSUS, should be classified in item 771.42, TSUS, because the eo nomine classification in item 771.45, TSUS, would modify a less specific heading applicable to sheets generally.

The petitioner also argues that sheets of acrylic resin are not "flexible" within the definition of item 771.42, TSUS, stating that since their commercial introduction in 1935, sheets of acrylic resin have been characterized as "rigid plastic sheets" without regard for their size or thickness. To support this position the petitioner cites the explanatory notes provided in the Tariff Classification Study, November 15, 1960, for Schedule 7, Part 12: Rubber and Plastic Products, which explain on page 451 that the rates specified in item 771.42, TSUS, were to apply to polyvinyl chloride film and sheets in imitation of patent and fancy leather, The petitioner contends that the specific reference to these materials, which are more flexible than sheets of acrylic resin, indicates that item 771.42, TSUS, was not intended to apply to articles which the plastics industry considers to be rigid. These are defined as plastic products having a flexural

modulus (a measure of flexibility) in excess of 100,000 pounds per square inch. The petitioner believes that the legislative history of items 771.42 and 771.45, TSUS, establishes that the authors of these items were aware of the commercial distinction between rigid and flexible plastic sheets. Therefore, the petitioner contends that the dictionary definition of a flexible sheet as one that can be easily bent must yield to industry standards of defining flexibility. Under these standards, sheets of acrylic resin are not considered flexible, and thus classification under item 771.42 would be improper.

COMMENTS

Pursuant to section 175.21(a) of the Customs Regulations (19 CFR 175.21(a)), the Customs Service invites written comments (preferably in triplicate) on this petition from all interested parties.

The American manufacturer's petition, as well as all comments received in response to this notice, will be available for public inspection in accordance with sections 103.8(b) and 175.21(b) of the Customs Regulations (19 CFR 103.8(b), 175.21(b)) during regular business hours at the Regulations and Legal Publications Division, Headquarters, U.S. Customs Service, room 2335, 1301 Constitution Avenue NW., Washington, D.C. 20229.

AUTHORITY

This notice is being published in accordance with section 175.21(a) of the Customs Regulations (19 CFR 175.21(a)).

January 8, 1979.

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

[Published in the Federal Register, Jan. 12, 1979 (44 F.R. 2745)]

Decisions of the United States Customs Court

Customs Rules Decision

(C.R.D. 78–18)

SPRAGUE ELECTRIC COMPANY *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST)

Opinion and Order on Defendant's Motion for a Protective Order

Court No. 77–9–03056

[Motion granted as to seven documents; ITC ordered to transmit eighth document to court for in camera inspection; defendant's request to file immediate appeal denied.]

(Dated December 27, 1978)

Stewart & Ikenson (*Eugene L. Stewart* and *Frederick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman* and *William F. Atkin*, trial attorneys), for the defendant.

NEWMAN, Judge: Defendant has again filed a motion for a protective order in this case respecting certain documents in the files of the International Trade Commission (ITC) sought by plaintiff, and in this connection defendant has now interposed a claim of executive privilege. That evidentiary privilege, which has been frequently encountered by the Federal courts in various disputes arising out of discovery, has taken on a paramount significance in this court in light of the expansion of our jurisdiction to review determinations of the Secretary of the Treasury and the ITC by the Trade Act of 1974 (Public Law No. 93–618, 88 Stat. 2052 (1975).

I

Defendant's motion is presented in the following context: This is an American manufacturer's action brought by plaintiff pursuant to 28 U.S.C. 1582 (b)(1970), 28 U.S.C. 2632(a) (Supp. V, 1975) and 19 U.S.C. 1516(c) (Supp. V, 1975) contesting the negative injury determination of ITC in investigation AA 1921–159 under the Antidumping Act of 1921, as amended (19 U.S.C. 160 et seq. (1970 and Supp. V, 1975) 41 F.R. 47604–07 (1976).[1] That investigation involved tantalum electrolytic fixed capacitors exported from Japan. Heretofore, in the course of discovery, plaintiff served upon defendant a second set of interrogatories and a second request for production of "All documents and things in the files of the International Trade Commission and/or individual Commissioners, pertaining to the Commission Investigation No. AA1921–159, involving Tantalum Electrolytic Fixed Capacitors from Japan," which investigation was the basis for the Commission's negative injury determination challenged in this action. Defendant thereupon moved for a protective order seeking to be relieved from responding to plaintiff's second set of interrogatories and second request for production grounded upon its theory of the scope and standard of review applicable to ITC injury determinations. By its prior motion, defendant sought to

[1]The jurisdictional uncertainty surrounding this action at the time issue was joined has been recently resolved in *SCM Corporation* v. *United States* (Brother International Corp., party-in-interest), 80 Cust. Ct. 226, C.R.D. 78–2 (1978), wherein Chief Judge Re held that the Customs Court has jurisdiction to review a negative injury determination by the Commission in an American manufacturer's action pursuant to 19 U.S.C. 1516(c). See also my recent opinion in *Armstrong Bros. Tool Co. et al.* v. *United States* (Great Neck Saw Manufacturing, Inc., party-in-interest), 80 Cust. Ct. 160, C.D. 4751 (1978), modified on rehearing, 81 Cust. Ct. —, C.R.D. 78–14 (1978), following the rationale of *SCM*.

prohibit plaintiff from conducting discovery into matters beyond the Commission's notice of investigation and hearing (41 F.R. 33337–38 (1976)), the Commission's negative injury determination and its statement of reasons (41 F.R. 47604–07 (1976)).

On June 27, 1978, I entered an order denying defendant's prior motion for a protective order and requiring that Kenneth R. Mason, Secretary of the ITC, prepare and transmit to Joseph E. Lombardi, clerk of the U.S. Customs Court, on or before July 28, 1978, the following: (1) A certified copy of the transcript of proceedings and exhibits introduced before the Commission in investigation AA1921–159; (2) certified copies of all written submissions, questionnaires, reports, and all other documents relating to investigation AA1921–159; and (3) all other thing in the files of the Commission relating to the investigation. The order of June 27, 1978, further provided that denial of defendant's then motion for a protective order was without prejudice to renewal respecting any documents or things that were received by the Commission on a confidental basis or are otherwise privileged. The predicate of my prior order was "to enable the court to determine whether or not the Commission's finding of injury was, among other things, arbitrary, an abuse of discretion, or otherwise contrary to law." *Sprague Electric Company* v. *United States* (Capar Components Corp., party-in-interest, 80 Cust. Ct. 256, 257, C.R.D. 78–7 (1978).

In conformance with the order of June 27, 1978, and a "Stipulation for Protective Order" approved on July 31, 1978, numerous "public" and "confidential" documents have been transmitted by the Secretary of the Commission to the clerk of this court. Defendant, however, now seeks to relieve the Secretary of the ITC from transmitting to the court, pursuant to the order, seven documents and a portion of one other document based upon a claim of executive privilege as formally asserted in an affidavit (with an annexed exhibit A) by Joseph O. Parker, Chairman of the ITC. These disputed documents are encompassed within the order of June 27, 1978, and thus defendant seeks a modification of that order. Alternatively, defendant seeks leave to proceed by way of an immediate appeal to the Court of Customs and Patent Appeals under 28 U.S.C. 1541(b) (1976) [2] in the event that its present motion for a protective order is not granted.

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[2] U.S.C. 1541(b) provides:

When the chief judge of the Customs Court issues an order under the provisions of section 256(b) of this title, or when any judge in the Customs Court, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation, the Court of Customs and Patent Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order * * *

II

As noted above, defendant's present motion rests upon executive privilege formally asserted in an affidavit executed by Chairman Parker.[3] Plaintiff contends that the claim of privilege has not been properly invoked by defendant because the Chairman of ITC is not the "head" of the Commission, and consequently cannot speak for that body as a whole. Hence, we first address the issue of whether the Chairman of the ITC can properly claim executive privilege on behalf of the Commission.

In *Smith* v. *F.T.C.*, 403 F. Supp. 1000 (D. Del. 1975), an analogous issue was raised by plaintiffs as to whether the Chairman of the Federal Trade Commission is the "head" of that Commission for purposes of asserting executive privilege claims. In holding for the Commission, the court articulated the following rationale (403 F. Supp. at 1016, n.48):

> Plaintiffs have challenged whether the Chairman of the FTC is the "head" of the Commission for purposes of asserting executive privilege claims with arguments that the Chairman is not able to act on behalf of the Commission as a whole. The Court finds this argument to be unpersuasive because neoliteral compliance with the requirement that an agency head act in this context is unnecessary. That requirement was designed to deter governmental units from too freely claiming a privilege that is not to be lightly invoked, *U.S.* v. *Reynolds*, *supra* [345 U.S. 1, 7–8 (1953)], by assuring that someone in a position of high authority could examine the materials involved from a vantage point involving both expertise and an overview-type perspective. It is impossible to suggest that allowing the FTC Chairman to raise these claims will undermine the purposes behind this requirement.

Here, it must be recognized that Chairman Parker is the chief administrative officer of the ITC.[4] Paraphrasing the *Smith* holding, Chairman Parker is "someone in a position of high authority [who] could examine the materials involved from a vantage point involving both expertise and an overview-type perspective." Plainly, then, the rationale adopted by the Court in *Smith* concerning the Chairman of the FTC is fully applicable here to the Chairman of the ITC. Within the doctrine of *United States* v. *Reynolds*, 345 U.S. 1, 7–8 (1953), the Chairman of the ITC is clearly the "head" of the Commission for purposes of asserting a claim of executive privilege, and such claim was properly made by him in this case on behalf of the Commission.

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[3] "A close reading of cases where claims of executive privilege were raised indicates that the necessary facts have generally been required to be raised by affidavit." *Smith* v. *F.T.C.*, 403 F. Supp. 1000, 1016 (D. Del. 1975).

[4] See 19 U.S.C. 1331(a) (1976), as amended by Public Law 95-106, 91 Stat. 868 (1977).

See also *Kerr* v. *United States District Court*, 511 F. 2d 192, 198 (9th Cir. 1975) (by implication), aff'd, 426 U.S. 394 (1976).

III

Having determined that the claim of executive privilege was properly asserted by the Chairman of the ITC, we turn to the question of whether defendant's claim is applicable under the circumstances in this case. True it is that a governmental agency cannot bend the law to its will. And furthermore, there is no question that the judiciary has the power to review the decision of an agency or department head to withhold production of documents under a claim of privilege, and to determine whether such claim should be upheld or overruled. *United States* v. *Nixon*, 418 U.S. 683, 705 (1974); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S. App. D.C. 385, 463 F. 2d 788, 793 (1971); *Machin* v. *Zuckert*, 114 U.S. App. D.C. 335, 316 F. 2d 336, 341 (1963), *cert. denied*, 375 U.S. 896 (1963); *Sun Oil Co.* v. *United States*, 514 F. 2d 1020, 1023 (Ct. Cl. 1975); *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958); *Kinoy* v. *Mitchell*, 67 F.R.D. 1, 7 (S.D.N.Y. 1975); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965).

In support of a formal claim of executive privilege, there must be "a specific designation and description of the documents" claimed to be privileged. *Black* v. *Sheraton Corp. of America*, 371 F. Supp. 97, 101 (D.D.C. 1974). Such designation and description "is necessary in order that a court be able to make a knowledgeable decision as to whether any document or portion thereof actually contains advisory or deliberative materials." *Smith* v. *F.T.C.*, 403 F. Supp. at 1016. In our case, exhibit A attached to Chairman Parker's affidavit specifically designates and describes each of the eight documents embraced by defendant's claim of executive privilege as follows:

Document	*Description*
a.	An undated three-page "pros and cons" statement prepared by the Commission's staff for the use of Commissioners in arriving at the Commission's injury determination with regard to tantalum capacitors from Japan. This statement sets forth suggested criteria to be used as well as possible reasons for and against an affirmative injury determination. The document contains staff advice and alternative views and recommendations as to injury or likelihood of injury to the domestic industry.
b.	An undated six-page draft opinion entitled "Statement of Reasons for a Determination of No Injury or Likelihood

Thereof" prepared by the Commission's staff for the consideration of, and use by, the Commissioners in arriving at their statements of reasons, with hand-written modifications made by, or at the direction of, individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations as well as tangible evidence of Commissioners' thought processes (in the case of the hand-written modifications).

c. An undated five-page draft opinion entitled "Statement of Reasons for Negative Determinations of Commissioners Will E. Leonard, Daniel Minchew, George M. Moore, Catherine Bedell, and Italo H. Ablondi" prepared by the Commission's staff for the consideration of, and use by, Commissioners in arriving at their statements of reasons. The document contains staff advice, conclusions, deliberations, opinions, and recommendations.

d. An undated seven-page draft opinion entitled "Statement of Reasons for Negative Determination of Chairman Will E. Leonard, Vice Chairman Daniel Minchew, and Commissioners George M. Moore, Catherine Bedell, and Italo Ablondi" prepared by the Commission's staff for the consideration of, and use by, the Commissioners in arriving at their statements of reasons, with hand-written modifications made by, or at the direction of, individual Commissioners. The document contains staff advice, conclusions, deliberations, opinions, and recommendations as well as tangible evidence of Commissioners' thought processes (in the case of the hand-written modifications).

e. An undated eight-page draft opinion entitled "Statement of Reasons for Affirmative Determination of Commissioner Joseph O. Parker" prepared by Commissioner Parker and his legal assistant for the exclusive consideration of, and use by, Commissioner Parker in arriving at his statement of reasons, with hand-written modifications made by, or at the direction of Commissioner Parker. The document contains advice, conclusions, deliberations, opinions, and recommendations as well as tangible evidence of a Commissioner's thought processes (in the case of the hand-written modifications).

f. A one-page internal memorandum, dated October 5, 1976, from John Byrne of the Accounting Division to Harold Graves of the Metals Division setting forth arguments for and against an affirmative injury determination.

g. A two-page undated hand-written original of the typed memorandum referred to in f.

h. A one-page internal memorandum, dated June 13, 1977, from N. A. Lynch, Director of Industries, to R. A. Cornell, Deputy Director, Office of Operations, concerning erroneous import statistics. Privilege is invoked only as to that portion

of the second paragraph of the memorandum which contains advice, characterization, and opinion regarding import statistics and their use.

Paragraphs 5 through 8 of Chairman Parker's affidavit recite the reasons for the claim of executive privilege, as follows:

5. All of the documents listed in exhibit A consist wholly of internal communications which were prepared by members of the Commission's staff solely for their own use and/or the use of Commissioners or other staff members, and which were never circulated or disclosed to outsiders. These documents set forth and reflect advisory opinions, conclusions, considerations, deliberations, and recommendations, and comprise part of the process by which the Commission's decisions are formulated and its official duties and responsibilities are discharged. The opinions and recommendations expressed in the documents may not reflect the ultimate views or position of the Commission or of individual Commissioners.

6. I believe free and frank discussion within the Commission to be an essential part of the decision-making process. To be effective, however, confidential communications, recommendations, views, and advisory opinions, such as are contained in the documents listed in Exhibit A, must remain immune from public disclosure.

7. In my judgment, the effective functioning of the Commission requires that the confidentiality of the advice, characterization and opinion in the second paragraph of document h and of the whole of document a through g be preserved. If these documents were disclosed, I believe the Commission's staff would be less candid in offering advice in the future, with resultant harm to the policy of open and frank discussion heretofore followed within the Commission. As a result, crucial decisions might be made with insufficient knowledge or inadequate advice. Additionally, disclosure of the hand-written modifications in documets b, d, and e would amount to an inappropriate probing of the methods by which individual Commissioners arrive at their decisions.

8. Since disclosure of the documents specified in Exhibit A would impair the free flow of advisory opinions, arguments, conclusions, considerations, deliberations, and recommendations within the Commission and thus adversely affect the public interest, I, as Chairman of the Commission, respectfully assert a formal claim of privilege as to those documents.

IV

The thrust of defendant's position is that the above-described documents comprise (wholly or partly) intragovernmental advice, opinions, and recommendations for which an evidentiary privilege

exists "so as to preserve the confidentiality of certain advice and/or evidence of the mental processes of Government personnel, including the Commissioners of the U.S. International Trade Commission, proferred [sic] during the course of the administrative proceedings in this case." Defendant's memorandum, at 2.

It is well established by a long line of decisions that the executive branch is privileged to withhold disclosure of intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are formulated. *EPA* v. *Mink*, 410 U.S. 73, 86–87 (1973); *Securities and Exchange Commission* v. *National Student Marketing Corp.*, 179 U.S. App. D.C. 56, 538 F. 2d 404 (1976); *United States* v. *Berrigan*, 482 F. 2d 171, 181 (3d Cir. 1973); *Smith* v. *F.T.C.*, 403 F. Supp. at 1014, et seq.; *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F. 2d at 792; *Boeing Airplane Co.* v. *Coggeshall*, 108 U.S. App. D.C. 106, 280 F. 2d 654, 660 (1960); *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra*; *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), aff'd sub nom. *V.E.B. Carl Zeiss, Jena* v. *Clark*, 128 U.S. App. D.C. 10, 384 F. 2d 979 (1967), cert. denied, 389 U.S. 952 (1967); *Union Oil Co. of California* v. *Morton*, 56 F.R.D. 643 (C.D. Cal. 1972); *Verrazzano Trading Corp.* v. *United States*, 70 Cust. Ct. 347, 350, C.R.D. 73–9 (1973). Cf. 5 U.S.C. 552(b)(5) (1976); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

The basis for the executive privilege asserted here by defendant was succinctly stated in *Smith* v. *F.T.C.*, *supra*, at 1015:

> * * * The purpose behind the executive privilege against disclosure of intra-agency advisory communications is the encouragement of frank discussion within the government as regards the formulation of policy. *U.S.* v. *Berrigan*, 482 F. 2d 171, 181 (3d Cir. 1973). This is because "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances * * * to the detriment of the decision-making process." *U.S.* v. *Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090, 3106, 41 L. Ed. 2d 1039 (1974). *Accord*, *Ackerly* v. *Ley*, 137 U.S. App. D.C. 133, 420 F. 2d 1336, 1341 (1969) ("there are enough incentives as it is for playing it safe and listing with the wind"). See also, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975).

An additional policy reason for preserving the confidentiality of intragovernmental opinions and deliberations is expressed in *Zeiss*, *supra*, at 325–26:

> As important as are these considerations, the cases, analyzed critically, demonstrate that the immunity of intra-governmental opinions and deliberations also rests upon another policy of

> equal vitality and scope. *The judiciary, the courts declare, is not authorized "to probe the mental processes" of an executive or administrative officer.* This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others—results demanded by exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision—indeed "[s]uch an examination of a judge would be destructive of judicial responsibility"—and by the same token "the integrity of the administrative process must be equally respected." Identically potent reasons dictate that protection no less extensive be afforded the processes by which the Attorney General's responsibilities for decisional and policy formulations, legal or otherwise, are discharged. [Italic supplied.]

Continuing, the court stated (p. 326):

> Inextricably intertwined, both in purpose and objective, are these two principles. The rule immunizing intra-governmental advice safeguards free expression by eliminating the possibility of outside examination as an inhibiting factor, but expressions assisting the reaching of a decision are part of the decision-making process. Similarly, the so-called "mental process rule" impresses the stamp of secrecy more directly upon the decision than upon the advice, but it extends to all phases of the decision-making process, of which the advice is a part. Each rule complements the other, and in combination they operate to preserve the integrity of the deliberative process itself. It is evident that to demand pre-decision data is at once to probe and imperil that process. [Footnotes omitted.]

Moreover, the genesis of executive privilege is based upon "the constitutional principle of separation of powers." *United States* v. *Berrigan*, 482 F. 2d at 181; *Black* v. *Sheraton Corp. of America*, 371 F. Supp. at 100 (D.D.C. 1974).

As we have seen, the Chairman of the ITC has formally asserted executive privilege with respect to specifically identified documents prepared by the Commission's staff that comprised part of the decision-making process. In *KFC National Management Corp.* v. *National Labor Relations Board*, 497 F. 2d 298, 304–05 (2d Cir. 1974), the second circuit—reviewing an unfair labor practice decision of the NLRB (which decision is "quasi-judicial" in nature, unlike an ITC injury determination)—cogently alluded to the "work product of such decision-making processes" as follows:

> Thus what emerges from the *Morgan*[5] quartet is the principle that those legally responsible for a decision must in fact make it, *but that their method of doing so—their thought processes, their reliance on their staffs—is largely beyond judicial scrutiny.*

[5] See *United States* v. *Morgan*, 313 U.S. 409 (1941) (*Morgan* IV).

> The court and many others have consistently relied on *Morgan* to uphold the use of hearing examiners in developing evidence and forming preliminary decisions, the reliance on staff assistants for recommendations and draft opinions, and a variety of other procedures designed to apprise those legally responsible for administrative decisions with the critical issues and evidence in a case and to record their individual determinations. *Concomitantly, the courts have consistently refused to issue subpoenas for the work product of such decision-making processes: Staff memos, expert reports, preliminary drafts, the oral testimony of the decision makers as to the basis for their opinions—all have been held to be beyond the purview of the contesting parties and the reviewing courts.* [Footnotes omitted. Italic supplied.]

The draft opinions and "pros and cons" statements sought by plaintiff (documents "a" through "g" in exhibit A)[6] comprise essentially intraagency advisory opinions and recommendations by the Commission's staff, and were an integral part of the Commission's deliverative process. Thus, these opinions and statements fit squarely within the concept of executive privilege as enunciated in the above-cited cases.[7] In the process of making injury determinations and other decisions within the scope of its authority, it is undoubtedly in the public interest that the Commission and its staff must necessarily feel free to explore various alternatives on a confidential basis. As pointed up in *Kaiser Aluminum*, 157 F. Supp. at 945–46:

> * * * Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.
>
> There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

In sum, it is not the function of this court "to probe the mental processes" of the ITC or its individual Commissioners in reaching the negative injury determination challenged by plaintiff in this action. Cf. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

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[6] Documents "f" and "g," setting forth arguments "for and against" an affirmative injury determination, are treated the same as the "pros and cons" statement, document "a."

[7] Document "h" will be considered infra.

V.

The ruling on defendant's motion respecting documents "a" through "g" would be apparent on the basis of what has been discussed thus far, but for one significant circumstance. The doctrine of executive privilege is not absolute, but is qualified. *Smith* v. *F.T.C.*, 403 F. Supp. at 1015; *Black* v. *Sheraton Corp. of America*, 371 F. Supp. at 100; *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. at 946. As stressed by the Court in *Black* (at 100):

> * * * Recognition of the claim [of executive privilege] requires *a delicate balancing of competing interests;* the public's interest in preserving confidentiality to promote open communication necessary for an orderly functioning of the government, and the individual's need for disclosure of particular information. *The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute.* [Italic supplied.]

Again, in *Smith* v. *F.T.C.*, *supra*, the court enunciated the concept of "balancing" as follows (403 F. Supp. at 1015):

> * * * While the exact showing necessary to surmount a governmental claim of privilege is unclear [footnote omitted], what is basically involved in each case is an *ad hoc* balancing of individual need for the materials against the harm resulting from any such disclosure. * * *

See also: *Nixon, supra; Sun Oil Co., supra; Union Oil Co., supra; Committee for Nuclear Resopnsibility, supra.*

We now consider the fundamental question of whether plaintiff has demonstrated a need for the disputed documents which outweighs the harm that disclosure may do to intragovernmental candor. A "delicate balancing of competing interests," of course, cannot be accomplished so as to achieve a result having the invariance of a precise mathematical equation.

Filtered to its essentials, the first need advanced by plaintiff for production of the documents involved herein is to obtain the facts. Executive privilege, of course, does not apply to purely factual data prepared for intra or interoffice use which would not compromise military or state secrets. *EPA* v. *Mink*, 410 U.S. at 87–88; *Verrazzano Trading Corp.* v. *United States*, 70 Cust. Ct. at 350–52. Even factual material included in deliberative memoranda has generally been held discoverable if susceptible to severance from its context. *See Smith* v. *F.T.C.*, 403 F. Supp. at 1015, and cases cited.

But nothing appearing in plaintiff's memorandum is persuasive that disclosure of the draft opinions and "pros and cons" statements is essential for obtaining the facts. It is emphasized that 130 "public"

and 107 "confidential" documents have already been transmitted to the court by the Commission pursuant to the order of June 27, 1978, and the "Stipulation for Protective Order" approved on July 31, 1978.[8] The within motion for a protective order covers but seven documents, and a portion of one other,[9] which are claimed by defendant to comprise advisory opinions and recommendations falling within the purview of executive privilege. Significantly, plaintiff's memorandum is devoid of any showing that the documents already furnished or otherwise accessible have not supplied the factual data which plaintiff requires.

Zeiss involved a somewhat analogous situation. There, the court found that the parties seeking to subpoena certain documents from the files of the Department of Justice, for which a claim of executive privilege was asserted by the Attorney General, had failed to demonstrate need for production overbalancing the interests protected by the privilege. It appears there that the Government had produced approximately 4,500 documents and claimed executive privilege as to 49 others. In essence, the Attorney General's affidavit recited (a) that the documents withheld comprised intradepartmental memoranda and interdepartmental communications containing opinions, recommendations, and deliberations pertaining to decisions the Department was required to make; and (b) the Attorney General's conclusion, following personal examination, that their production would be contrary to the public interest.

In sustaining the Government's claim of executive privilege, the court expressed this rationale (40 F.R.D. at 327–28):

> Approximately 4,500 documents have already been furnished the claimants; those which have not been total only 49. While the issue at bar is not to be resolved by numbers alone, the sharp contrast between the data that have been produced and those that have not is quite revealing. The claimants have had access to all of the Government's communications with outsiders, as well as to nearly all intra-governmental materials, and the items withheld are all internal papers. Thus there could remain no unseen document primarily attesting the Government's relations with third persons. *More importantly, what are retained are intra-departmental memoranda and inter-departmental communications composed wholly of opinions, recommendations and deliberations relating to legal and other determinations. There is an obvious distinction, in terms of necessity for inspection, between documents of this character and those which contain facts.*

---

[8] The motion papers do not state the precise number of these "public" and "confidential" documents. An examination by the Court reveals that these figures are indicated on the lists transmitted by the Secretary of the ITC. These documents fill two large cartons, and several are quite bulky and extensive in nature.

[9] Defendant asserts that only a portion of the second paragraph of document "h" is privileged.

> While examination of the contested papers is not to be denied simply because they are secondary rather than primary sources, the size and diversification of the production already made raises great doubt as to what additional information tendencies they could have. * * *
>
> *The claimants' presentation is also devoid of a showing that the papers already furnished have not supplied the great bulk of the information for which the claimants earlier professed a need.* Nothing appears that would make illogical the assumption that, the number and diversification of these documents considered, fresh non-governmental sources of information were indicated by exploration of which, through deposition or otherwise, additional information could be developed. There is noting beyond sheer speculation to even hint that the information the retained communications drew upon as the basis for the opinions and recommendations expressed does not appear or is not discoverable from the mass of data the claimants now possess. *Necessity for production is sharply reduced where an available alternative for obtaining the desired evidence has not been explored.* [Italic supplied. Footnotes omitted.]

In *Kaiser Aluminum*, plaintiff brought an action against the Government for breach of a most favored purchaser clause in a contract for the sale of war plants to plaintiff. Plaintiff moved for production of a document containing an advisory opinion on intraoffice policy concerning the sales of the plants, and a claim of executive privilege from discovery was asserted by the General Services Administration. In sustaining the Government's claim of privilege, the Court of Claims stated as the linchpin of its decision (157 F. Supp. at 946–47):

> * * * The document sought here was a part of the administrative reasoning process that reached the conclusion embodied in the contracts with Kaiser and Reynolds. *The objective facts, such as the cost, condition, efficiency, terms and suitability are otherwise available.* So far as disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privileged from inspection as against public interest but not absolutely. It is necessary therefore to consider the circumstances around the demand for this document in order to determine whether or not its production is injurious to the consultative functions of government that the privilege of non-disclosure protects.
>
> We have spoken of the broad coverage of the plaintiff's request. While this is not the attorney-client privilege, the demand for this document seeks to lay bare the discussion and methods of reasoning of public officials. The fact that the author is dead is immaterial here. It is not a privilege to protect the official but one to protect free discussion of prospective operations and policy. This goes beyond the disclosure of primary facts upon which conclusions are based. It is akin to the request for "pro-

duction of written statements and mental impressions contained in the files and the mind of the attorney," which are unprotected by the attorney-client privilege. Cf. *Hickman* v. *Taylor, supra*, 329 U.S. at page 509, 67 S. Ct. at page 392. *Nothing is alleged by Kaiser, through the affidavit of its negotiating Vice President, Mr. Calhoun, or otherwise, to suggest any need for production of the document to establish facts.* [Italic supplied.]

Under the totality of the circumstances in this case, I do not find an "overbalancing" need by plaintiff for the draft opinions and "pros and cons" statements to establish the facts.

VI

Plaintiff further contends that because of the voluminous administrative record in this case, the draft opinions and "pros and cons" statements may help to focus on the facts and documents thought (by the Government) to be most significant. It is apparant from this flawed contention that plaintiff seeks the draft opinions and "pros and cons" statements as indicia of the elements or considerations which entered into the Commission's deliberative process. Use of the draft opiuions and "pros and cons" statements for that purpose "would clearly violate the established rule * * * forbidding investigation into the processes by which decisions and policies are formulated". *Zeiss*, 40 F.R.D. at 329. And Cf. *Rosee* v. *Board of Trade*, 36 F.R.D. 684, 689 (N.D. Ill. 1965), wherein the court stated: "[T]he cerebrations and mental processes of government officials, leading to admittedly proper exercises of power, can never be a factor in a judicial proceeding and, therefore, need not be disclosed".[10]

The nub of the matter is, that after applying the "delicate balancing concept, plaintiff's showing of need for the draft opinions and "pros and cons" statements does not "overcome" the Commission's substantial showing of need for confidentiality embraced within the principle of qualified privilege afforded advisory opinions and recommendations.

VII

We now turn to plaintiff's suggestion that the disputed documents be transmitted to the court for an "in camera" inspection.

A

Where discovery is resisted, as in the instant case, courts frequently examine documents in camera in order to determine whether they should be held in a confidential status or be disclosed to the party seeking production. See *United States* v. *Nixon*, 418 U.S. at

[10] *Rosee* was cited on another point by the Supreme Court in *EPA* v. *Mink*, 410 U.S. 73, 88 (1973).

714–16; *EPA* v. *Mink*, 410 U.S. at 88 and cases cited; *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78–3 (1978); *Verrazzano Trading Corp.* v. *United States*, 69 Cust. Ct. 307, 314, C.R.D. 72–19, 349 F. Supp. 1401 (1972); *Sun Oil Co.* v. *United States*, 514 F. 2d at 1024–25. Confidentiality is not diminished by in camera inspection. *Nixon*, 418 U.S. at 706. However, in camera inspection is not to be utilized in every case as a matter of course. In this connection, the Supreme Court definitively admonished, in *EPA*, 410 U.S. at 92–94:

> * * * As was said in *Kaiser Aluminum & Chemical Corp.*, 141 Ct. Cl. at 50, 157 F. Supp. at 947: "It seems * * * obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U.S.C. § 552(a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual infomation. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the barebones of protected matter. In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. *United States* v. *Reynolds*, 345 U.S. 1 (1953). In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection.

Thus, in *Kaiser Aluminum* (cited with approval by the Supreme Court in *EPA*, *supra*) the Court of Claims refused to make an in camera inspection of a document containing an intraagency advisory opinion because of plaintiff's failure to make a definite showing of necessity; and in this connection the court commented (157 F. Supp. at 947–48):

> * * * To require it [examination of the privileged document] here would mean the creation of an absolute right for judicial

examination and determination of all evidence whose discovery the executive deemed contrary to the public interest. If executive determination is to be merely preliminary, the officer and agency most aware of the needs of government and most cognizant with the circumstances surrounding the legal claim will have to yield determination to another officer less well equipped. Circumstances may require such a course. This should not be ordered without definite showing by plaintiff of facts indicating reasonable cause for requiring such a submission.

The *Zeiss* court similarly declined to make an in camera inspection, and defined the circumstances under which such inspection would be appropriate (40 F.R.D. at 331–32):

> *In camera* inspection in executive privilege cases is appropriate where it appears with reasonable clarity that the party seeking production is entitled to access to some of the materials demanded. Examination in this type of situation enables the separation of what should be disclosed from what should not be revealed. Again, it may be that the balance between competing needs for confidentiality and disclosure cannot be made without analysis of the disputed data. Here the inspection enables the weighing to be done in the privacy of the judge's chambers. In each situation, however, a need, actual or potential, for production adequately appears, and the examination affords the means for fulfilling that need.
>
> That no such occasion is presented in this case is amply demonstrated, without plowing old ground, by brief reference to previous discussion. *The claimants have not shown that they are or could be entitled to the documents the Government still retains. The Government, on the other hand, has made a substantial showing that everything that is withheld falls well within the scope and protection of the privilege, and it satisfactorily appears that the balance on disclosure or secrecy is decidedly in its favor.* It is clear, too, that the claimants' projected investigation into the Government's decisional and deliberative processes is legally impermissible, and the circumstances rather plainly suggest that they have alternatives they might utilize to obtain that to which they may be entitled. Here inspection can satisfy no need for separation, for there appears nothing to separate; nor any need for balancing, with apparently nothing here to be weighed. [Footnotes omitted. Italic supplied.]

See also: *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra; Walled Lake Door Co.* v. *United States*, 31 F.R.D. 258 (E.D. Mich. 1962).

B

As previously noted, the Chairman of the Commission has submitted an affidavit describing the content of the documents claimed to be privileged. Plaintiff, however, insists that the Court should not

rely exclusively upon the Chairman's characterization of the documents, but should conduct an in camera inspection. In connection with utilizing in camera inspection to verify the accuracy of an affidavit claiming executive privilege, the court observed in *Zeiss*, at 332:

> The claimants, however, contend for an *in camera* inspection for purposes of verifying that the content of the documents withheld is what the Government says it is. But to require examination here for that reason alone would mean not only an utter disregard for the affidavit of an executive with Cabinet status, but also "the creation of an absolute right for judicial examination and determination of all evidence whose discovery the executive deemed contrary to the public interest." The necessity the moving party must show is considerably more than a demand that someone other than his adversary look at the materials in question to make certain that statements as to their character are accurate. [Footnotes omitted.]

Hence, following the foregoing reasoning, I find no necessity in the present case for examining in camera documents "a" through "g" for the purpose of verifying the accuracy of the descriptions set forth in exhibit A of the affidavit submitted by defendant.

C

However, a different situation is presented in document "h," described in exhibit A of Chairman Parker's affidavit as a "memorandum * * * concerning erroneous import statistics," for which the Chairman invokes a claim of executive privilege "only as to that portion of the second paragraph of the memorandum which contains advice, characterization, and opinion regarding import statistics and their use." Exhibit A of the Parker affidavit.

In *Zeiss*, the court noted (40 F.R.D. at 332, n. 61) that in certain cases where the courts utilized the in camera inspection procedure for determining claims of executive privilege, "it appeared, before the inspection was ordered, that the claimant was entitled to some amount of discovery," and it was necessary to separate the privileged and unprivileged materials. Here, plaintiff concededly is entitled to a severable, but undelineated, portion of the second paragraph of document "h". It is, obviously, for the court and not the Chairman of the ITC to decide what portion of the second paragraph is or is not privileged. Cf. *Machin* v. *Zuckert*, 316 F. 2d at 341. Consequently, I shall make an in camera inspection of document "h" before reaching and determining the claim of privilege as to that document. Indeed, there can be no doubt of the propriety of such in camera inspection. *Kerr* v. *United States District Court*, 426 U.S. 394 (1976); *United States* v.

Nixon, 418 U.S. at 706; *Sun Oil Co.* v. *United States*, 514 F. 2d at 1024; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d at 792, 794; *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d at 662; *Smith* v. *F.T.C.*, 403 F. Supp. at 1018; *O'Keefe* v. *Boeing Co.*, 38 F.R.D. at 336; *United States* v. *Certain Parcels of Land*, 15 F.R.D. 224, 231 (S.D. Cal. 1954).

After careful consideration of defendant's present motion for a protective order and its alternative request for permission to appeal, and its memorandum and affidavit in support thereof, plaintiff's memorandum in opposition thereto, and all other papers and proceedings had herein, it is hereby ORDERED:

1. That defendant's motion for a protective order is granted with respect to documents "a" through "g" described in exhibit A annexed to the affidavit of the Chairman of the ITC.

2. That the Secretary of the ITC is relieved from the requirement to transmit to the clerk of the court documents "a" through "g" described in exhibit A annexed to the affidavit of the Chairman of the ITC.

3. That within thirty (30) days of the entry of this order, the Secretary of the ITC shall prepare and transmit under seal to Joseph E. Lombardi, clerk of the U.S. Customs Court, two certified copies of document "h" described in said exhibit A, for which a claim of executive privilege has been made by the Chairman of the ITC respecting a portion of the second paragraph of the document. One certified copy shall be in complete and unexpurgated form; the second copy shall have excised therefrom the portion of the second paragraph which defendant claims comprises privileged matter.

4. That document "h" shall be inspected by the court in camera for the purpose of considering defendant's claim of executive privilege, and determining whether the excised portion of the second paragraph of the document comprises privileged matter which should not be disclosed to plaintiff.

5. That this court's order of June 27, 1978, is modified in accordance with the foregoing paragraphs.

6. Defendant's alternative request to file an immediate appeal from this order pursuant to 28 U.S.C. 1541(b) is denied.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *January 2, 1979.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P78/159	Ford, J. December 26, 1978	Norman G. Jensen, Inc.	73-12-03354	Item 692.35 6.5% or 5.5% Item 692.16 5% Item 948.00 10%	Item 693.30 Free of duty	U.S. v. Norman G. Jensen, Inc. (C.A.D. 1183)	Grand Portge (Duluth) Skidder tractors

P78/160	Maletz, J. December 27, 1978	Bar & Barbeque Products, Inc.	77-11-04669 etc.	Item 653.39 19%	Item 688.40 5.5%	Agreed statement of facts	Los Angeles Electrical novelty items (electric signal bar lamps and parts)
P78/161	Maletz, J. December 27, 1978	Border Brokerage Co., Inc.	75-5-01171	Item 727.55 10%	Item 518.44 0.1¢ per lb.	Agreed statement of facts	Blaine (Seattle) Articles in part of asbestos and hydraulic cement (patio tubs, pots, planters, etc.)
P78/162	Maletz, J. December 27, 1978	S.S. Kresge Co.	77-8-01709	Item 206.98 8%	Item A206.98 Free of duty pursuant to general headnote 3(c)	Agreed statement of facts	Savannah Wood coaster sets

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R78/247	Newman, J. December 27, 1978	Ernest Lowenstein, Inc.	R63/7996, etc.	Export value	Invoiced unit prices less 2.845%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glassstones, pendants, beads, etc.
R78/248	Newman, J. December 27, 1978	Ernest Lowenstein, Inc.	R63/8925, etc.	Export value	Appraised values less 15%	U.S. v. Ernest Lowenstein, Inc. (A.R.D. 325)	New York Glassstones, pendants, beads, etc.
R78/249	Newman, J. December 27, 1978	Yoshida International, Inc.	R70/1730, e/c.	Constructed value	Invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts, advisorily classified under either item 745.70, 745.72 or 745.74

Judgment of the U.S. Customs Court in Appealed Case
December 28, 1978

APPEAL 78–6.—Amico, Inc. *v.* United States.—"MUSICAL DANCING COUPLE"—TOYS—MUSIC BOXES—MUSIC BOXES/DOLLS—"MORE THAN" DOCTRINE—ENTIRETIES—TSUS.—C.D. 4723 modified October 26, 1978 (C.A.D. 1214); items of merchandise described as "Musical Dancing Couple in Plastic Dome" with or without additional words of decription properly dutiable as "music boxes" under item 725.50, Tariff Schedules of the United States, at the modified rate of 8 percent ad valorem (T.D. 68–9).

ERRATUM

Volume 12, No. 49 of the CUSTOMS BULLETIN AND DECISIONS (Dec. 6, 1978), an error in the publication of the decision of the U.S. Customs Court in the case of *Hawaiian Independent Refinery* v. *United States*, C.D. 4777 (Nov. 6, 1978).

On page 48 of the above-mentioned issue of the BULLETIN, a portion of footnote 1 has been incorrectly placed in the text immediately following the quoted portion of the statute. The passage beginning with the phrase, "The privilege to which this proviso refers * * *", and ending with " * * * * . , that is—nonprivileged foreign merchandise.", should be placed in footnote 1 immediately after the quotation of the statutory proviso therein.

Following this correction, the text of the opinion found on page 48 should contain the quoted portion of the statute followed at the margin by the passage which begins, "For purposes of the entry of foreign merchandise * * *"

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

R. E. CHASEN,
Commissioner of Customs.

In the Matter of
CERTAIN ROTARY SCRAPING TOOLS } Investigation No. 337–TA–62

Notice of Investigation

Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 5, 1978, and amended on December 21, 1978, and January 3, 1979, under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), on behalf of the Thompson Tool Co., Inc., 17 Butler Street, Norwalk, Conn. 06854. The complaint alleges that unfair methods of competition and unfair acts exist in the importation of certain rotary scraping tools into the United States, or in their sale, by reason of the alleged coverage of such rotary scraping tools by the claims of U.S. Letters Patent 3,958,294, and by reason of misleading packaging and/or deceptive advertising of the imported rotary scraping tools, including the simulation of complainant's trade dress.

The complaint alleges that the effect and tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. Complainant requests both temporary and permanent exclusion of said imports from entry into the United States. Complainant further requests a cease and desist order prohibiting mislead-

ing packaging and/or deceptive advertising of the imported rotary scraping tools.

Having considered the complaint, the United States International Trade Commission, on January 3, 1979, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), an investigation be instituted to determine under subsection (c) whether there is, or there is reason to believe that there is, a violation of subsection (a) of this section in the unauthorized importation of certain rotary scraping tools into the United States, or in their sale, by reason of the alleged coverage of such rotary scraping tools by the claims of U.S. Letters Patent No. 3,958,294, and by reason of misleading packaging and/or deceptive advertising of the imported rotary scraping tools, including the simulation of complainant's trade dress, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States;

(2) For the purpose of this investigation so instituted, the following are hereby named as parties:

(a) The complainant is—

The Thompson Tool Company, Inc.
17 Butler Street
Norwalk, Conn. 06854

(b) The respondents are the following companies alleged to be involved in the unauthorized importation of such articles into the United States, or in their sale, and are parties upon which the complaint and this notice are to be served:

Dao Hung Manufacturing Co.
6th Floor, 21–1 Lane 16 Sec. 4
Chung Shiao E. Rd.
Taipei, Taiwan

John Sturgess House, Inc.
47 Riverside Avenue
Westport, Conn. 06880

Colonial Tool Company, Inc.
P.O. Box 181
Hohokus, N.J. 07432

King Imports, Ltd.
Garfield, N.J. 07026
Marco Hardware
Newark, N.J. 07104

Fay Products
450 Chruch Avenue
Brooklyn, N.Y. 11203

Caprice Products
New York, N.Y. 10010

(c) David J. Dir, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, is hereby named Commission investigative attorney, a party to this investigation; and

(3) For the investigation so instituted, Chief Administrative Law Judge Donald K. Duvall, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall designate the presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure, as amended (19 CFR 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the Rules, such responses will be considered by the U.S. International Trade Commission if received no later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and will authorize the presiding officer and the U.S. International Trade Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and in this notice and to enter both a recommended determination and a final determination containing such findings.

The complaint is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and in the Commission's New York City office, 6 World Trade Center, New York 10048.

By order of the Commission.

Issued: January 5, 1979.

KENNETH R. MASON,
Secretary.

Index

U.S. Customs Service

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